

Chen v. Gonzales, 02-71428+

SEP 11 2006

Kleinfeld, Circuit Judge, concurring in part and dissenting in part: **CATHY A. CATTERSON, CLERK**
U.S. COURT OF APPEALS

I concur in 02-71428. I respectfully dissent in 05-71433. “We review the BIA’s findings of fact, including credibility findings, for substantial evidence and must uphold the BIA’s finding unless the evidence compels a contrary result.”¹

Chen obtained a K-1 visa by marrying an American homosexual afflicted with AIDS. The INS denied her application for permanent resident status and initiated deportation. Chen’s husband died and she married another American. At the hearing, she claimed the dead husband beat, raped, and otherwise mistreated her. Although the IJ found Chen credible, this very charitable finding affected only whether she would get voluntary departure, not whether she would be deported. The IJ found Chen out of status because her marriage was fraudulent, and ordered her deportation. Chen appealed, but the BIA summarily affirmed the IJ.

Chen did not file this motion to reopen until years had elapsed and she had

¹ Monjaraz-Munoz v. INS, 327 F.3d 892, 895 (9th Cir. 2003).

failed to depart. The BIA reasonably denied this “discretionary” and “disfavored” motion.² A Violence Against Women Act claim would have succeeded only if counsel preserved the IJ’s unexpectedly favorable credibility finding, a risky course if credibility affected deportation and not just voluntary departure.

The majority impermissibly substitutes its judgment for counsel’s and the IJ’s, and concludes failure to pursue Chen’s Violence Against Women Act claim amounts to ineffective assistance of counsel.

² INS v. Doherty, 502 U.S. 314, 321, 112 S. Ct. 719, 116 L. Ed. 2d 823 (1992).